United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7210

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B

EULA LEE BLOWERS, individually and on behalf of all other persons similarly situated,

Plaintiff-Appellant

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NO. T-4548

Applicant for Intervention-Appellant

-v-

P/S

LAWYERS COOPERATIVE PUBLISHING COMPANY, INC., DONALD BENNETT, CHARLES DONNER and ROBERT FEIN

Defendant-Appellees

****

PATRICIA LOUGHNEY and GENESEE VALLEY CHAPTER OF THE NATIONAL ORGANIZATION FOR WOMEN

NO. T-4549

Plaintiff-Appellant

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Applicant for Intervention-Appellant

-v-

LAWYERS COOPERATIVE PUBLISHING COMPANY, INC.

Defendant-Appellee

****

MARY NAGEOTTE, VINCENZA LINDA GRICE, PASHA BAKER, PAT PRUSAK, ELLEN MICHELSON, ELIZABETH ARES, MARGARET MOULTON, BEVERLY NEATROUR, VIRGINIA SWEENEY and GENESEE VALLEY CHAPTER OF THE NATIONAL ORGANIZATION FOR WOMEN

NO. T-4550

Plaintiff-Appellant

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Applicant for Intervention-Appellant

-v-

LAWYERS COOPERATIVE PUBLISHING COMPANY, INC.

Defendant-Appellee

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ON APPEAL FROM DECISIONS AND ORDERS OF
THE UNITED STATES DISTRICT COURT OF
THE WESTERN DISTRICT OF NEW YORK

Civil Action Nos. 1973-47, 1973-238, 1973-346

BRIEF OF PLAINTIFF-APPELLANTS

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Rule 24(b) - Federal Rules of Civil Procedure

> PERMISSIVE INTERVENTION. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(f)(1)

> ....Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance...

STATEMENT OF ISSUE PRESENTED

Has the court erred in denying the applications of the Equal Employment Opportunity Commission to intervene since the applications meet all the requirements in law?

STATEMENT OF THE CASE

This is an appeal from the Orders and Decisions of the Honorable Harold P. Burke, Judge, United States District Court for the Western District of New York, denying the applications of the Equal Employment Opportunity Commission to intervene in three separate, but related lawsuits pending against defendant-appellant Lawyers Cooperative Publishing Company. (Blowers et al v. Lawyers Cooperative Publishing Company et al, Civil Action No. 1973-47; Loughney et al v. Lawyers Cooperative Publishing Company, Civil Action No. 1973-238; Nageotte et al v. Lawyers Cooperative Publishing Company, Civil Action No. 1973-346.) The Orders and Decisions are dated Feb.21,1975. They are unreported but appear in the Joint Appendix at pages 254-256; 415,416; 462, 463.

The first of these lawsuits, Blowers et al v. Lawyers Cooperative Publishing Company et al, Civil Action No. 1973-47, was initiated with the filing of the complaint on January 29, 1973. (A 5-19). The second and third actions, Loughney et al v. Lawyers Cooperative Publishing Company, Civil Action No. 1973-238, and Nageotte et al v. Lawyers Cooperative Publishing Company, Civil Action No. 1973-346 were initiated by the filing of Complaints on May 5, 1973 and July 12, 1973, respectively, after the lower court had not yet reached decision on the motion of plaintiff Blowers to designate all the would-be plaintiffs in the latter two cases as named plaintiffs and members of the class

in Blowers et al v. Lawyers Cooperative Publishing Company et al. (A 260, 421, 97-112.)

The claims of all plaintiffs had first been filed with the state anti-discrimination agency, the New York State Division of Human Rights, as required by Title VII of the Civil Rights Act of 1964. Since plaintiff Blowers had been the first in time to perfect her claim with the state anti-discrimination agency and the first to cross-file with the Equal Employment Opportunity Commission, she was the first plaintiff to be entitled to the Right to Sue Notice enabling a person with an employment discrimination complaint to proceed with a federal lawsuit. As the other persons with claims of employment discrimination against Lawyers Cooperative Publishing Company received their Right to Sue Notices from the Equal Employment Opportunity Commission, plaintiff Blowers moved to add all other persons and those persons moved to be added as named plaintiffs and members of the class in the Blowers litigation by motion of April 6, 1973. However, when the lower court had not acted on plaintiff Blowers' motion to add all other claimants as named plaintiffs and members of the class in the Blowers litigation, the Loughney and Nageotte litigation was initiated to comply with the statutory requirement of Title VII of the Civil Rights Act of 1964 that a person with a claim file the lawsuit within

ninety days of the issuance of the Right to Sue Notice. /1 (A 300-312.)

All the plaintiffs in these lawsuits are past or present female employees of Lawyers Cooperative Publishing Company - the nation's second largest publisher, if not largest publisher of legal materials. All of the plaintiffs claim that Lawyers Cooperative Publishing Company has discriminated against them because of sex, race and national origin with respect to compensation, terms, conditions and privileges of employment and that the defendants have limited and segregated and classified them so as to deprive them of equal employment opportunities and adversely affect their status as employees because of sex, race and national origin. For example, the plaintiffs claim that (1) Lawyers Cooperative Publishing Company maintains a policy of discimination against its women employees by excluding women from certain job classifications (2) Lawyers Cooperative Publishing Company maintains a policy, practice, custom and usage of discrimination against its women employees by placing them in low, menial classifications while requiring them to perform work of high, technical or professional caliber in classification and paying them at low, menial rates of pay (3) Lawyers Cooperative

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/1 The lower court has never ruled on the motion of plaintiff Blowers joined in by the other persons with claims to have them named as plaintiffs and members of the class in the Blowers litigation. However, as is more fully set forth hereafter, the lower court in its decision in the Blowers litigation, February 21,1975, granted the alternative request of the Equal Employment Opportunity Commission to consolidate the three lawsuits. (A 254-256.)

Lawyers Cooperative Publishing Company discriminates against female e ployees by a conscious practice of filling only certain jobs with women employees which it carefully recruits with a design to hire only those women who will work for sub-standard wages and be docile (4) Lawyers Cooperative Publishing Company recruits the white male for the best paying, career-oriented jobs while seeking and hiring women, for low paying, mediocre jobs with little or no career, supervisory or managerial potential (5) Lawyers Cooperative Publishing Company excludes women from training programs which men with the equivalent or less education and skill are enrolled (6) Lawyers Cooperative Publishing Company discriminates against women employees by classifying and assigning jobs for white male employees as jobs which are career, supervisory and management orien ed while classifying jobs for women which are low paying and menial and without career, supervisory or management potential (7) Lawyers Cooperative Publishing Company discriminates against women employees by promoting or transferring employees so that the white male is advanced to high paying, career-oriented, supervisory and management jobs while the women are retained in low paying, me al jobs (8) Lawyers Cooperative Publishing Company discriminates against women by paying them in whatever job description, classification or job level, less than while male counterparts when the education, skill and competence of the woman employee equals or exceeds the education, skill and

competence of the while male engaged in the same or similar work (9) Lawyers Cooperative Publishing Company discriminates against women by fostering an atmosphere in the employment situation which is calculated to harass, embarrass, humiliate and thereby cause the women employee to "keep her place" (10) Lawyers Cooperative Publishing Company discriminates against women employees by denying sick leave and other benefits to them when they become pregnant during the course of their employment. (A5-19; 260-279; 421-452.)

These actions are brought pursuant to Title VII of the Civil Rights Act of 1964 and 42 U.S.C. Section 1981. Plaintiffs seek to secure their rights to equal employment opportunities. They request declaratory judgment, injunctive relief, compensatory damages, punitive damages and attorneys fees and costs. Plaintiff Blowers in her lawsuit seeks designation as a class action. The class to be represented is composed of female persons who have been employed, are employed, might be employed or have made application to be employed by Lawyers Cooperative Publishing Company. As hereafter explained more fully, the lower court has not yet ruled on the designation of these lawsuits as a class action although such designation has been sought by the plaintiffs since April, 1973. (A5-19; 260-279; 421-452; 78-96.)

With the service of their answer in the Blowers litigation on or about February 20, 1973, defendants served

Notice of Deposition of plaintiff. On February 23, 1973, plaintiff Blowers served Cross Notice of Deposition requiring the presence of defendants, agents of defendants and employees of defendants directly involved in plaintiff Blowers' complaint. The Notice further required the defendants, agents and/or employees to produce any and all documentary evidence in their possession relating directly or indirectly to the issues raised in the complaint. In advance of the date of the scheduled deposition of the plaintiff Blowers, attorneys for defendant were notified by plaintiff Blowers' attorney of the order in which the depositionsof the defendant would be conducted ;the attorney further submitted a list of specific documents in defendants' possession which were expected to be produced by the defendants at the depositions./2 (A 20, 35, 36-56.)

Plaintiff Blowers proceeded in good faith to appear for her scheduled deposition. However, from the outset, defendants engaged in a pattern of harassment of plaintiff Blowers and her counsel and frustration of the discovery process. Attorneys for the defendants, for example, insisted on the presence of persons in the examination room which they would only identify, after persistent questioning from plaintiff Blowers' attorney, as

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/2 On February 23, 1973, defendants likewise served on attorney for plaintiff Blowers First Interrogatories Propounded by Defendants.

"persons who were trying to decide whether they wanted to become lawyers." There was constant badgering of plaintiff Blowers during her testimony, over objection of her attorney. The defendants had present throughout plaintiff Blowers' deposition a lawyer not involved in questioning and who was seated across from plaintiff Blowers engaging in distracting movements and gestures. (A 36-56.)

At the conclusion of the first day's deposition, plaintiff Blowers' attorney had difficulty securing the return of the originals of documents which she had supplied to defendants' attorneys during the course of the deposition. Attorneys for defendants announced that they would have to schedule another time convenient to themselves for the continuation of plaintiff Blowers' deposition. Attorneys for defendants announced that they would not appear for the depositions scheduled by plaintiff Blowers or produce documents, pursuant to notice previously duly served. Defendants took the position that they would not participate in any disclosure until they had completed all the disclosure they thought necessary of the plaintiff. (A 36-56.)

Plaintiff Blowers thereafter moved for an order compelling the defendants to appear for depositions and to produce documents, for protective order in the conduct of her depositions and for an extension of time in which to answer defendants' First Interrogatories since the refusal of the defendants to participate

in discovery made it impossible to answer the questions. This motion to compel discovery has been pending since March 22, 1973. In the lower court's order of November 6, 1973 it deferred decision on this and other motions. While plaintiff Blowers has renewed her request to compel the defendants to participate in discovery by motion dated February 11, 1974, there has been no decision by the lower court. (A36-56; 117,118; 122-129.)

In motions returnable before the lower court on April 9, 1973, plaintiff Blowers sought the designation of her lawsuit as a class action while the defendants opposed such designation. On April 27, 1973 the Equal Employment Opportunity Commission sought leave to appear amicus curiae in support of plaintiff Blowers' application to constitute the lawsuit a class action. By order dated November 6, 1973, the lower court directed that there should be a preliminary evidentiary hearing to determine "...whether the named plaintiff, Blowers, is a member of the class she seeks to represent in this class action, and on such provisions of Rule 23 as may be relevant; and further if the named plaintiff, Blowers, is a member of a class of persons who have suffered discrimination, how the class should be delineated." The court specifically directed that the hearing would not inquire whether "...plaintiff can succeed on her own individual claim." (A 78-96; 115-118.)

By Notice to Produce dated April 2, 1974 and by First

Interrogatories Propounded by Plaintiff dated April 3, 1974, plaintiff Blowers again sought discovery from the defendants. She moved by motion of April 3, 1974 to shorten the time in which the defendants would comply with discovery, pointing out that the court had scheduled an evidentiary hearing on the designation of the lawsuit as a class action, that the information requested is directly relevant to the determination that the lawsuit is properly maintained as a class action and that so far plaintiff Blowers had been stymied in the development of her litigation by the refusal of the defendants, defying the provisions of the Federal Rules of Civil Procedure to appear for depositions and produce relevant documents. Defendants opposed the answering interrogatories. Defendants ignored the notice to produce and plaintiff Blowers moved by motion dated May 7, 1974 to compel production. The court has not yet ruled on plaintiff Blowers' motions. (A 132-178; 195-199.)

In opposing plaintiff Blowers' motions to compel discovery, defendants have, on occasion, suggested that plaintiff Blowers simply did not take advantage of discovery offered. However, after such suggestion was made by the defendants, plaintiff Blowers' attorney personally asked defendants' attorneys to proceed with discovery only to find that request denied. The details of those efforts by plaintiff Blowers' attorney were outlined for the court in Supplemental Affirmation in Support of Motion to Compel Discovery dated May 17, 1974. (A 203-211.)

Since plaintiff Blowers was being stymied by the defendants in their total refusal to participate in discovery, request was made of the Office of Federal Contract Compliance with whom complaint of the company-wide, class-wide discrimination had been made by plaintiff Genesee Valley Chapter of the National Organization for Women, for the forwarding of all affirmative action programs, compliance reports, investigative materials relating to Lawyers Cooperative Publishing Company. The Company initiated a lawsuit for injunctive relief and declaratory judgment (see Lawyers Cooperative Publishing Company v. Schlessinger, et al, Civil Action No. 1974-212) in an effort to prevent the plaintiffs herein from gaining access to these materials. Plaintiffs in these lawsuits moved to intervene in Lawyers Cooperative Publishing Company v. Schlessinger, et al to assert their right to and interest in the production of these documents which directly support their claims of company-wide, class-wide discrimination. The application for intervention was granted and the plaintiffs participated in the trial of the action before the Honorable Harold P. Burke, Judge, United States District Court for the Western District of New York, on June 10 and 11, 1974 and July 2 and 3, 1974. During the course of this litigation, counsel for the plaintiffs herein, over the objection of the attorneys for Lawyers Cooperative Publishing Company was given access to the materials in question at the Chambers of the lower

court judge./3

On May 20, 1974, the lower court began its evidentiary hearing on the question of constituting the Blowers litigation a class action. While plaintiff Blowers had served a comprehensive subpoena on Lawyers Cooperative Publishing Company in connection with production of documents which would underscore the company-wide, class-wide discrimination, attorneys for the company objected to the subpoena as burdensome and the court observed at the outset that it would not be bogged down with document considerations. The evidentiary hearing on class action was continued before the lower court on September 20, 1974 with the court, at this time, allowing the introduction of the Lawyers Cooperative Publishing Company affirmative action programs and compliance reports to which attorney for plaintiffs herein had gained access in the Lawyers Cooperative Publishing Company v. Schlessinger, et al litigation. (Orig. rec. no. 79, transcript of proceedings May 20, 1974, pp. 11-15; orig. rec. no.80, transcript of proceedings Sept.20, 1974, pp. 322-328; 332; 344,345, 385, 397.) Attorneys for the Equal Employment Opportunity Commission attended all sessions of the class action evidentiary hearing as

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/3 On April 22, 1975, the court ruled that all documents in question in Lawyers Cooperative Publishing Company v. Schlessinger, et al are public documents and must be disclosed. The court specifically rejected the Lawyers Cooperative Publishing Company arguments that the documents are protected from disclosure by statutory provision, that disclosure would injure its competitive position or if read out of context, would lead persons to believe that the company is not an equal opportunity employer. Since the decision is unreported, a copy of the decision is attached hereto as Appendix A.

amicus curiae. At the conclusion of the evidence on September 20, 1974, attorney for the Equal Employment Opportunity Commission argued orally in support of the designation of the Blowers litigation as a class action. The attorney also advised the court of the Commission's active consideration of an application for intervention. (Orig. rec., no. 80, transcript of proceedings, September 20, 1974, pp.402,403.)

Transcripts of the class action hearing were filed on October 29, 1974. Submission of the question to the court was completed following final briefing by the parties on January 28,1975. To date there has been no decision on plaintiff Blowers' application to constitute Blowers litigation a class action. (A 221-225.)

On October 25, 1974, the Equal Employment Opportunity Commission filed its motion for leave to intervene in the Blowers litigation. The motion was consented to by the plaintiff Blowers. It was opposed by defendants. The court denied the application by decision and order of February 21, 1975, from which decision and order appeal herein is taken. (A 212-226; 254-256.)

Since the lower court took no action on plaintiff Blowers' application to make all persons with claims against Lawyers Cooperative Publishing Company named plaintiffs and members of the class in her lawsuit, motion dated April 6, 1973, the separate lawsuits of Loughney and Nageotte pended separately but with a

similar experience in obstruction and frustration by the defendant, Lawyers Cooperative Publishing Company. The defendant first raised jurisdictional and standing questions in the Loughney litigation. Even after the court had denied those motions by order of November 6, 1973, the defendant in the Nageotte litigation, pursued the identical motions. The court again denied the challenge to jurisdiction and standing by order filed March 27, 1974. (Orig. rec. no. 44; A 282, 283.)

The Equal Employment Opportunity Commission appeared Loughney litigation with the filing on July 23, 1973 for amicus curiae status. The Commission first appeared in the Nageotte litigation with the filing on November 8, 1974 of application to appear amicus curiae. In both instances the Commission supported the standing of all named plaintiffs to pursue their claims of employment discrimination against Lawyers Cooperative Publishing Company. (A 280, 281; 453, 454.)

After the defendants' motion attacking jurisdiction and standing was denied in the Loughney litigation, defendant served its answer and interrogatories. Plaintiffs moved by motion dated February 8, 1974 to compel the defendants to appear for depositions and produce documents pursuant to duly served notices in the Blowers class action litigation, of which plaintiffs in the Loughney litigation are members. Plaintiffs requested an extension of time in which to answer defendants' first

Interrogatories until such time as the defendant participated in discovery and requested that certain of the interrogatories be struck. Plaintiffs served Notice of Deposition and Notice to Produce of same date. Plaintiffs emphasized that the three cases pending against Lawyers Cooperative Publishing Company are essentially one piece of litigation and should be conducted as a class action. The discovery in the three cases should be the discovery in a duly constituted class action litigation. Defendant opposed the taking of depositions as noticed by the plaintiff and ultimately filed a totally incomplete response to the Notice to Produce, asserting in the main that documents requested were "privileged" from disclosure. (A 284-319.)

By Order of October 29, 1974, the Honorable Harold P. Burke, Judge, United States District Court for the Western District of New York, directed that plaintiffs should answer defendants' interrogatories as best as possible, indicating lack of information and the control of that information in the defendant where necessary. The court struck certain of the interrogatories. The court further ordered that the defendant, its agents and/or employees noticed to appear for depositions would be ordered by the court to appear for depositions upon filing of the answers to defendant's First Interrogatories. The order further provided that the defendant would be required to produce its affirmative action programs at the depositions. (A 341-343).

Plaintiffs duly served Answers to First Interrogatories Propounded by Defendant in the Loughney litigation on December 2, 1974. Thereafter, plaintiffs moved by motion dated December 18, 1974 for the court to set the dates of depositions. Prior to the beginning of the depositions, on dates which counsel for plaintiffs and defendant had agreed upon after plaintiff's motion, plaintiffs sought the cooperation of the defendant in the participation of the Equal Employment Opportunity Commission in the depositions noting that all three cases are essentially one piece of litigation, that class action designation of the litigation is pending and that the application of the Equal Employment Opportunity Commission to intervene in the Blowers litigation was pending. In sum, plaintiffs pointed out that discovery in all three cases would be facilitated and expedited by the cooperation of counsel for both parties and the Equal Employment Opportunity Commission. (A 344-382; orig. rec. no. 57.)

When attorneys for defendant refused to lend its cooperation to the expediting of discovery offered by plaintiffs in the Loughney litigation, plaintiffs moved by Notice of Motion dated January 20, 1975 to permit the Equal Employment Opportunity Commission to participate in the depositions. While attorneys for the Commission pointed out that the three lawsuits are essentially one piece of litigation and that they had pending their application to intervene in the Blowers litigation,

Defendant opposed participation by the Commission claiming that it lacked any "status" as a party to participate. (A 383-397; 402-408.)

To clarify any question of "status" the Equal Employment Opportunity Commission moved by Notice of Motion filed February 6, 1975 to intervene in the Loughney litigation and in the Nageotte litigation. The Commission joined in the motions previously made, April 6, 1973, in the Blowers litigation that all plaintiffs be named as such in the Blowers litigation and designated as class members. In the alternative, the Commission requested that the court, in effect, accomplish the same thing by consolidating all three cases. (A 409, 458.)

Plaintiffs in the Loughney and Nageotte litigation consented to the applications of the Equal Employment Opportunity Commission to intervene, noting, as had been noted in the Blowers litigation that the claims of the Commission and the plaintiffs are the same and there are, therefore, common questions of law and fact which ought to be tried in one lawsuit. The Commission had participated as amicus curiae in each lawsuit and was familiar with the progress; there would need be no delay in any proceedings by the granting of intervention. There would be no delay in the case since the Commission was willing to join in the requests for discovery made by the plaintiffs to date and would coordinate future discovery requests with the plaintiffs. Virtually no discovery had taken place except for the discovery

volunteered by the plaintiff Blowers or the interrogatories in the Loughney litigation. Not only had there been virtually no discovery in any of the cases but there had been no decision on any of the major, preliminary questions, such as the constituting of the Blowers litigation as a class action lawsuit. The Commission could aid in the determination of the lawsuit, of first importance in the district, because of its special expertise and resources as the agency of the national government responsible for the enforcement of Title VII of the Civil Rights Act of 1964. Defendant opposed the intervention of the Commission claiming such intervention would create delay, intervention application was a way of harassing it and the granting of intervention would amount to it being "double-teamed." (A 410-414; 459-461.)

By Order and Decision dated February 21, 1975, the Honorable Harold P. Burke, Judge, United States District Court for the Western District of New York, denied the application of the Equal Employment Opportunity Commission to intervene in the Loughney litigation and also denied plaintiffs' motion to permit the Commission to participate in depositions. By Order and Decision of the same date, the lower court denied the Commission's application to intervene in Nageotte litigation. In each instance, the court relied on its rationale for denying intervention in the Blowers litigation. Appeal herein is from the lower court's denial of intervention in the Blowers, Loughney and Nageotte litigations. (A 415-417; 462-464.)

ARGUMENT

I. THE COURT BELOW ERRED IN DENYING THE APPLICATIONS OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION TO INTERVENE SINCE THE APPLICATIONS MEET ALL THE REQUIREMENTS IN LAW

Rule 24(b) of the Federal Rules of Civil Procedure provides that:

> "Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the interventions will unduly delay or prejudice the adjudication of the rights of the original parties."

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 200e-5(f)(1), provides that a federal district court in a Title VII lawsuit may permit the Equal Employment Opportunity Commission to intervene, upon timely application and upon certification that the case is of general public importance. The Commission has certified that each of these lawsuits is a case of general public importance. Timely application for intervention has been made.

The timing of an application for intervention is of course directly related to the progress of litigation and the availability of information on which a determination for intervention can be made. The most important factor in considering the appropriateness of intervention is whether there will be delay in the litigation by the intervention of another party and if there is delay whether that delay will prejudice the parties to the case. Smith Petroleum Service Inc. v. Monsanto Chem. Co., 420 F2d 1103 (5th Cir. 1970). Courts have allowed intervention months or even years after the original filing of the lawsuit where the substantial litigation of the issues has not been commenced when the motion to intervene is filed. Smith Petroleum Service Inc. v. Monsanto Chem. Co., supra, and cases cited therein. The delay in the Smith Petroleum case was more than a year and a half. In Dudley v. Southeastern Factor & Finance Corp., 57 F.R.D. 177 (N.D. Ga. 1972), intervention was permitted although the motion to intervene was filed three years after commencement of the action. In Innis, Speiden & Co. v. Food Machinery Corp., 2 F.R.D. 261 (D.C. Del. 1942), intervention was permitted four years after the initiation of the litigation but the case had not yet been set for trial. Similarly in Moore v. Tangipahoa Parrish School Bd., 298 F.Supp. 288 (E. D. La. 1969), intervention was permitted four years after the lawsuit was initiated. Recently in Hughes v. Timex Corp., ____ F.Supp. ____ 8 EDP ¶9776 (D.C. Ark. 1974), the Equal Employment Opportunity Commission was permitted

to intervene nearly four years after the lawsuit was filed and where the intervention expanded the scope of the claims.

As has already been outlined, the Equal Employment Opportunity Commission has participated in each of these lawsuits as amicus curiae from shortly after the filing of each lawsuit. The conduct of the litigation has been stiffled by the defendants' total refusal to participate in discovery. At the time of the Commission's most recent applications for intervention, filed February 6, 1975, the defendants had successully avoided appearing at all depositions noticed, had ignored or refused to answer all notices to produce with one exception where blanket claims of privilege from production were asserted; the defendants had not answered a single interrogatory. Information substantiating for the Commission the company-wide, class-wide scope of the discrimination asserted by the plaintiffs was first made available through the efforts of the plaintiffs in intervening in Lawyers Cooperative Publishing Company v. Schlessinger, et al where the company tried unsuccessfully to prevent plaintiffs' attorney access to the company's affirmative action programs, compliance reviews and supporting data.

With plaintiffs succeeding at the continuation of the Blowers class action evidentiary hearing on September 20, 1974 with the introduction of exhibits previously marked in the Lawyers Cooperative Publishing Company v. Schlessinger, et al litigation, the Commission attorney advised the lower court of

its active consideration of intervention. The application for intervention by the Commission was filed in the Blowers litigation on October 25, 1974, approximately one month after the hard evidence of defendant's discrimination was placed in evidence in the Blowers litigation. The Commission did not file the intervention applications in the Loughney and Nageotte litigations until February 6, 1975 because it has always considered these three cases as one piece of litigation and it had already requested that the court consitute the Blowers litigation a class action, joining in plaintiffs' request that plaintiffs in the Loughney and Nageotte litigation be added as named plaintiffs and members of the class in the Blowers litigation.

Not only did the Commission make application for intervention as soon as information was available to it but the intervention is at a stage in the lawsuits where the substantial litigation of the issues has not been commenced. To the extent that any motions have already been litigated or decided, the Commission has told the court that there will be no need for new submissions. The Commission has been heard amicus curiae in many of the issues which have been litigated or which are submitted. The court has pending the question of designating the Blowers litigation a class action. The Commission has supported that designation and would submit no new material. The Commission has advised the court that it will join in all of plaintiffs' discovery applications to date and coordinate future requests for discovery

with counsel for plaintiffs.

Plaintiffs have consented to the intervention of the Commission noting the benefits of such participation to the court and to the parties. Defendants have opposed intervention on groundless assertions that there will be delay in the litigation. The only source of the delay in the litigation so far has been defendants' total refusal to expedite discovery. Defendant argues absurdly that intervention constitutes "harassment" and that intervention will amount to being "double-teamed."

Where appropriate, application for intervention can be conditioned on the intervenor agreeing not to delay the litigation. United States v. Massachusetts Bordin & Ins. Co., 303 F.2d 823 (2nd Cir. 1962). However, it is apparent in this litigation that the intervenor applicant Commission has emphasized that it will participate in this litigation from time of intervention forward, necessitating no special conditioning of the application.

Thus, the requirements of Rule 24(b)(1) for permissive intervention under the Federal Rules have been met. Moreover, the applicant for intervention has also independently satisfied the requirements for permissive intervention under Rule 24(b)(2) - the claims of the Commission and the claims of the plaintiffs in these lawsuits present questions of law and fact in common.

These cases are, as Moore puts it in Moore's Federal Practice, 2nd Edition, Volume 3B ¶24.10[2], the "most obvious case for permissive intervention" - the "situation where the

intervenor has a claim against the defendant similar to or identical with that asserted by the plaintiff." A comparison of the complaints of plaintiffs demonstrate that the plaintiffs and the Commission alike charge the defendants with company-wide, class-wide discrimination in employment and that the plaintiffs and the Commission request the same or similar relief from that discrimination. The denial of the Commission's application to intervene means that separate litigation must be undertaken by the Commission. That litigation will obviously be duplicative of the time and efforts of all parties in this litigation. It is clearly error for the court to have denied intervention.

The applicant for intervention, Equal Employment Opportunity Commission therefore has satisfied, independently the requirements of Rule 24(b)(2). The error of the court below is manifest in its opinion since its denial of intervention is based not on any failure of the applicant for intervention to satisfy the requirements of Rule 24(b) but rather its decision is based on non-existent facts. The court, for example, makes no ruling that the applications for intervention are untimely. Rather the court denys intervention because "There is a danger that intervention may reopen or duplicate discovery that has already occurred. There is a danger that intervention may result in different views between plaintiff's counsel and the Commission, particularly as to possible appeals, which will delay the action."

There is no basis whatsoever in the record for the court's perception of "danger." Both plaintiffs and the Commission represented that there would be no duplication or reopening of discovery. Not only has there been virtually no discovery but the Commission and the plaintiffs represented that discovery applications to date could be considered joint applications and that in the future those efforts would be coordinated.

Nor is the court's perception of "danger" as to <u>future</u> "different views between plaintiff's counsel and the Commission" justified. The entire record in this case to date demonstrates the support of the Commission for the position and work of the plaintiffs. If the possiblility of the intervenors and the plaintiffs disagreeing at some future date on some yet unidentified issue in the litigation were a basis in law for the denial of intervention, there could, of course, never be any permissive intervention since that circumstance is always a possibility. In this case and on this record there is absolutely no indication of disagreement now or in the past between plaintiffs and applicant for intervention. This is a Title VII lawsuit; there is ample authority for the conduct of this lawsuit developed in other district courts around the country. Since plaintiffs and applicants for intervention both ask for the same relief, the possibility of their being disagreement in the lawsuit is indeed remote.

CONCLUSION

For the foregoing reasons, plaintiff-appellants respectfully request that the court reverse the lower court's denial of intervention in these cases to the Equal Employment Opportunity Commission and direct that such intervention be granted.

Respectfully submitted,

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Rochester, New York 14614
Telephone: 716/232-2292

May 30, 1975

APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THE LAWYERS COOPERATIVE PUBLISHING COMPANY,

Plaintiff

- vs -

CIVIL 1974-212

JAMES A. SCHLESINGER, SECRETARY, U.S. DEPARTMENT OF DEFENSE; LT. GEN. WALLACE ROBINSON, DIRECTOR, DEFENSE SUPPLY AGENCY; PHILIP J. DAVIS, DIRECTOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE; PETER J. BRENNAN, SECRETARY, DEPARTMENT OF LABOR,

Defendants

EULA LEE BLOWERS, PATRICIA LOUGHNEY, GENESEE VALLEY CHAPTER OF THE NATIONAL ORGANIZATION FOR WOMEN, MARY NAGEOTTE, VINCENZA LINDA GRICE, PASCHA BAKER, PAT PRUSAK, ELLEN MICHELSON, ELIZABETH ARES, MARGARET MOULTON, BEVERLY NEATROUR, VIRGINIA SWEENEY,

Intervenors

Nixon, Hargrave, Devans & Doyle
Lincoln First Tower
Rochester, N.Y. 14603
Attorneys for plaintiff

David G. Larimer
Assistant United States Attorney
for the defendants

Emmelyn Logan-Baldwin
510 Powers Building
Rochester, N.Y. 14614
Attorney for intervenors

Trial at Rochester, New York, July 2 and July 3, 1974.

FINDINGS OF FACT

1. This court has jurisdiction to determine this action. The doctrine of sovereign immunity does not preclude this suit. Plaintiff is not barred by failure to exhaust administrative remedies.

2. This is an action for a declaratory judgment and a permanent injunction enjoining the defendants from releasing and disclosing plaintiff's Affirmative Action Programs and EEO-1 Reports and supplemental data furnished therewith. The plaintiff filed a first amended complaint dated May 6, 1974.

3. As a condition of doing business with the government under a contractual agreement, the plaintiff agreed to comply with government regulations concerning equal opportunity and elimination of discrimination in employment. Under that agreement plaintiff has furnished the government with information regarding its business. The plaintiff has furnished Affirmative Action Programs (AAP's) for its operations and Equal Employment Opportunity Commission Reports (EEO-1's) and has furnished supplemental data in connection with such reports.

4. Under government Disclosure Rules the defendants may refuse to disclose information obtained from the plaintiff

only if such information falls within exemptions listed in 41 CFR 60-40.3. No federal statute specifically exempts AAP's and EEO-1's from disclosure by the Department of Defense and the Office of Federal Contract Compliance.

5. The information sought to be prevented from release by this suit is not exempt from disclosure under the Freedom of Information Act or the Disclosure Rules.

6. AAP's and EEO-1's are not exempt from disclosure under Section 709-(e) of Title 7 of the Civil Rights Act, 42 U.S.C. 2000e-8(e), 18 U.S.C. 1905 or 44 U.S.C. 3508(a).

7. The regulation 41 CFR 60-40 was promulgated under the rule making provisions of the Administrative Procedure Act. General notice of the proposed rule making was published in the Federal Register as required by the Act. Due process was afforded when notice of the proposed rule making was established in the Federal Register.

8. Affirmative Action Plans are subject to disclosure, 41 CFR 60-40.2. The regulation informs interested parties that certain information may be withheld in the discretion of the agencies and informs interested parties of criteria by which such determinations are made. Interested parties are given an opportunity to submit their views, 41 CFR 60-40.3.

9. Plaintiff's business consists of the publication of original books on legal subjects, the legal encyclopedia

American Jurisprudence, periodical supplements, and various annotated volumes. This is not an industry involving high technology or secret production processes. The release of the information will not provide plaintiff's competitors with any information of substantial value in analyzing plaintiff's competitive or financial status. The proof does not establish that the plaintiff will suffer substantial harm to its economic and competitive position if the information is released.

10. Even if the information sought to be prevented from release in this action was submitted under promise of confidentiality, such a promise does not prevent disclosure, because it is not exempt from disclosure by statute or regulations.

IT IS HEREBY ORDERED and ADJUDGED that the action is dismissed on the merits. The first amended complaint is dismissed on the merits with costs to the defendants. The defendants are stayed from releasing the information for a period of 30 days to afford the plaintiff an opportunity to appeal.

Harold P. Burke

HAROLD P. BURKE
United States District Judge

April 22, 1975.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Plaintiff-Appellants has been served on the defendants by my causing three copies of the same to be mailed, properly addressed, postage prepaid to attorneys for defendants, Nixon, Hargrave, Devans & Doyle, John B. McCrory, Esquire, of counsel, Lincoln First Tower, Rochester, New York 14604 and the same has also been served on the intervenor-applicant, Equal Employment Opportunity Commission by my mailing three copies of the same, properly addressed, postage prepaid to attorneys for intervenor-applicant, James Scanlan, Esquire, Equal Employment Opportunity Commission, 2401 E Street, N.W., Washington, D.C. 20506, this 30th day of May, 1975.

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May 30, 1975